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GAMESTOP, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 ALEX MATHESON, an individual, on
12 behalf of himself and on behalf of all
persons similarly situated,

13 Plaintiff,

14 || VS.

15 GAMESTOP, INC., a Minnesota
16 Corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No. '12CV1812 LAB NLS

**DEFENDANT GAMESTOP, INC.'S NOTICE
OF REMOVAL TO THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF CALIFORNIA**

Diversity Jurisdiction Under The Class Action Fairness Act

[28 U.S.C. §§ 1332(d), 1441, 1446 and 1453]

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**MORGAN, LEWIS &
BOCKIUS LLP**
ATTORNEYS AT LAW
IRVINE

DEFENDANT'S NOTICE OF REMOVAL

**TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA:**

PLEASE TAKE NOTICE THAT, pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, Defendant GAMESTOP, INC. (“Defendant” or “GameStop”) hereby removes the above-entitled action from the Superior Court of the State of California, in and for the County of San Diego, to the United States District Court for the Southern District of California. Removal is based on the following grounds:

I. THE REMOVAL IS TIMELY

This Notice of Removal is timely filed, pursuant to 28 U.S.C. § 1446(b), because it is filed within thirty days from June 22, 2012, the effective date of service of the Complaint and Summons that were mailed by certified mail on June 12, 2012. No previous Notice of Removal has been filed or made with this Court for the relief sought herein.

II. THIS COURT HAS ORIGINAL SUBJECT MATTER JURISDICTION

This Court has original subject matter jurisdiction based on diversity of citizenship under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), because plaintiff is diverse from defendant and the amount in controversy exceeds \$5 million. Plaintiff brings this action as a putative class action on behalf of a California putative class, and alleges that he is a citizen of California. Ex. A, Complaint, ¶¶ 3-4. Defendant is not a citizen of California, but is a citizen of Texas and Minnesota. Ex. A, Complaint, ¶ 1; *see also* Ex. B, Declaration of Everett B. “Chuck” Smith (“Smith Decl.”), ¶ 3. In addition, Plaintiff’s class claims, when aggregated for potential class members, puts into controversy damages in excess of \$5 million.

Removal under diversity jurisdiction is therefore proper pursuant to 28 U.S.C. §§ 1446 and 1453.

A. Diversity Exists Between The Parties

The parties meet the diversity requirements of CAFA because one or more Plaintiffs, including members of the putative class, are citizens of different states from Defendant. 28 U.S.C. § 1332(d)(2)(A) (providing that diversity is met under this subsection where “any member

1 of a class of plaintiffs is a citizen of a State different from any defendant"). Diversity therefore
 2 exists between the parties under CAFA.

3 1. Plaintiff and the Members of the Putative Class Are California Citizens

4 At the time Plaintiff filed this action, Plaintiff alleged that he is a resident of San Diego
 5 County, California. Ex. A, Complaint, ¶ 3. In addition, Defendant's records reflect that
 6 Plaintiff's last address was in California. Ex. B, Smith Decl., ¶ 2. For diversity purposes, he is
 7 therefore considered a citizen of California.

8 Members of the putative class are also alleged to be citizens of California, because
 9 Plaintiff purports to represent a putative class of all persons who "were employed by Defendant
 10 GameStop, Inc. in California as non-exempt employees." Ex. A, Complaint, ¶ 4.

11 2. Defendant Is Not a Citizen of California

12 For diversity determination purposes, Defendant GameStop, Inc. is diverse from Plaintiff
 13 and putative members because Defendant is not a citizen of California. Plaintiff himself admits
 14 that Defendant GameStop, Inc. resides in the State of Texas. Ex. A, Complaint, ¶ 1.

15 GameStop, Inc. is a Minnesota corporation with its principal place of business located in
 16 Grapevine, Texas. Ex. A, Complaint, ¶ 1; Ex. B, Smith Decl., ¶ 3. GameStop, Inc. maintains its
 17 headquarters in Grapevine, Texas, and its officers direct, control, and coordinate the corporation's
 18 business activities from Grapevine, Texas. Ex. B, Smith Decl., ¶ 3. Accordingly, Grapevine,
 19 Texas is the "nerve center" of Defendant for diversity purposes, and Defendant is not now, and
 20 was not at the time this action was instituted, a citizen of the State of California. *See Hertz Corp.*
 21 *v. Friend*, 559 U.S. ___, 130 S. Ct. 1181, 1186, 1192, 175 L. Ed. 2d 1029 (2010) (a corporation's
 22 principal place of business for diversity purposes is its "nerve center" -- the location where the
 23 corporation's officers direct, control, and coordinate the corporation's activities).

24 Although Plaintiff has named 50 fictitiously-named "Doe" defendants, the citizenship of
 25 these "Doe" defendants is disregarded for purposes of removal. 28 U.S.C. § 1441(a); *Newcombe*
 26 *v. Adolf Coors Co.*, 157 F.3d 686, 690-91 (9th Cir. 1998) (for removal purposes, the citizenship
 27 of defendants sued under fictitious names shall be disregarded).

1 Accordingly, Defendant is not a resident of California for diversity jurisdiction purposes,
 2 and is therefore diverse from Plaintiff and the putative class he purports to represent.
 3

4 **B. The Amount Plaintiff Places in Controversy Exceeds \$5 Million**

5 Pursuant to CAFA, the amount in controversy component of diversity jurisdiction is
 6 satisfied when the aggregated claims of the individual members in a class action exceed the sum
 7 or value of \$5 million. *See 28 U.S.C. § 1332(d)(6)*. Furthermore, Congress intended for federal
 8 jurisdiction to be appropriate under CAFA “if the value of the matter in litigation exceeds
 9 \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and
 10 regardless of the type of relief sought (e.g., damages, injunctive relief, or declaratory relief).”
 11 Senate Judiciary Report, S. REP. 109-14, at 42.

12 Here, the Complaint does not allege a specific dollar amount Plaintiff seeks to recover.
 13 When a plaintiff fails to plead a specific amount of damages, the defendant must establish “by a
 14 preponderance of the evidence that the amount in controversy requirement has been met.”
 15 *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 997-98 (9th Cir. 2007). Under the
 16 preponderance of evidence standard, a defendant need only make a factual showing that it is more
 17 likely than not the amount in controversy exceeds \$5 million. *Singer v. State Farm Mut. Auto.*
 18 *Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997). “Said burden is not ‘daunting,’ as courts recognize
 19 that under this standard, a removing defendant is not obligated to ‘research, state, and prove the
 20 plaintiff’s claims for damages.’” *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1204-
 21 05 (E.D. Cal 2008). The ultimate inquiry is what amount is put “in controversy” by the plaintiff’s
 22 complaint, not what a defendant will actually owe. *Rippee v. Boston Market Corp.*, 408 F. Supp.
 23 2d 982, 986 (S.D. Cal. 2005); *Scherer v. Equitable Life Assurance Society of the United States*,
 24 347 F.3d 394, 397-99 (2d Cir. 2003) (recognizing that the ultimate or provable amount of
 25 damages is not what is considered when determining the amount in controversy; rather, it is the
 26 amount put in controversy by the plaintiff’s complaint).

27 Although Defendant denies Plaintiff’s factual allegations and denies that he or the class
 28 that he purports to represent are entitled to the relief for which he has prayed, Plaintiff’s

allegations and prayer for relief have “more likely than not” put into controversy an amount that exceeds the \$5 million threshold when aggregating the claims of the potential class members as set forth in 28 U.S.C. § 1332(d)(6).

Plaintiff seeks to represent a class of all current and former non-exempt employees in California from June 5, 2008 until present, and a “California Sub-Class” from June 5, 2009 until present. Ex. A, Complaint, ¶¶ 4, 34. Plaintiff’s Complaint alleges three causes of action under the California Labor Code and Business & Professions Code: unfair competition pursuant to Business & Professions Code sections 17200 *et seq.*, failure to pay regular and overtime wages pursuant to Labor Code sections 510 and 1194, and failure to provide accurate itemized statements pursuant to Labor Code section 226. These causes of action allege that Defendant required class members to work off the clock, miscalculated overtime payments, failed to provide meal and rest breaks, and failed to provide accurate wage statements. *See generally*, Ex. A, Complaint.

For California Sub-Class alleged in the Complaint, during the period between June 5, 2009 through February July 5, 2012, the number of current and former non-exempt GameStop employees in California was over 15,000. Ex. B, Smith Decl., ¶ 4. As discussed below, when the claims of these current and former employees are aggregated, their claims put into controversy over \$5 million in damages.

1. Plaintiff's Third Cause of Action for Wage Statement Violations Seeks In Excess of \$5 Million

Plaintiff's Third Cause of Action, for failure to provide accurate wage statements, by itself creates an amount in controversy in excess of \$5 million.

A defendant seeking to invoke CAFA jurisdiction can establish the amount in controversy by presenting evidence of the number of putative class members or class claims. *Korn v. Polo Ralph Lauren*, 536 F. Supp. 2d 1199, 1206 (E.D. Cal. 2008) (plaintiff's motion for remand denied). The number of putative class claims can then be multiplied by the damages alleged per claim to determine the amount in controversy. *Id.* In *Korn v. Polo Ralph Lauren*, for example, plaintiffs brought a class action alleging violations of California Civil Code section 1747.08,

1 which carries a maximum civil penalty of \$1,000 per claim. To establish the \$5 million amount
 2 in controversy for CAFA jurisdiction purposes, the defendant offered evidence that more than
 3 5,000 potential claims (credit card transactions) took place during the class period. The court
 4 found this evidence sufficient to prove, by a preponderance of the evidence, that the amount in
 5 controversy under CAFA was met, by multiplying the number of claims by the statutory penalty.
 6 *Id.* In addressing the defendant's evidentiary burden, the court held, "defendant need only
 7 demonstrate that there are at least 5,001 putative class claims." *Id.* Because the 5,001 putative
 8 class claims multiplied by the \$1,000 statutory penalty resulted in an amount in controversy
 9 greater than \$5 million, the district court found the amount in controversy satisfied, and denied
 10 plaintiff's motion to remand.

11 Here, Plaintiff alleges that Defendant "fail[ed] to provide an accurate wage statement in
 12 writing that properly and accurately itemized all hours worked by PLAINTIFF and the other
 13 members of the CALIFORNIA LABOR SUB-CLASS." Ex. A, Complaint, ¶ 76. He further
 14 alleges that Plaintiff and the class he purports to represent are thus entitled to damages as
 15 provided for in Labor Code section 226. Ex. A, Complaint, ¶ 77.

16 Labor Code section 226(e) provides that an employee is entitled to recover the greater of
 17 all actual damages or \$50 for the initial violation and \$100 for each subsequent violation, up to a
 18 maximum of \$4,000, plus costs and reasonable attorneys' fees, if an employer knowingly and
 19 intentionally fails to provide an accurate, itemized wage statement. Cal. Labor Code § 226(e);
 20 Ex. A, Complaint, ¶ 77. Such an award may be granted for each wage statement issued that fails
 21 to comply with section 226's requirements. Thus, according to Plaintiff's theory, he would be
 22 entitled to no less than \$50 for the first violation, plus \$100 for each subsequent violation, for
 23 every pay period during the class period where he allegedly did not receive an accurate statement
 24 of wages, subject to a maximum award of \$4,000. This maximum award of \$4,000 would be
 25 reached if he (or employees similarly situated) received 41 or more inaccurate wage statements
 26 (\$50 first alleged violation + 40 alleged subsequent violations x \$100 = \$4,050, in excess of the
 27 statutory maximum); or, in other words, was employed for at least 41 pay periods. In addition,
 28

1 under Plaintiff's alleged claim, each member of the putative class that he purports to represent
 2 would also be entitled to such an award, up to a maximum award of \$4,000 for each putative class
 3 member.

4 GameStop pays wages to its non-exempt employees in California on a bi-weekly basis, for
 5 a total of 26 pay periods per year. Ex. B, Smith Decl., ¶ 5. As alleged in the Complaint, the class
 6 period for the "California Sub-Class" began three years prior to the filing of the original action on
 7 June 5, 2012. Thus, the alleged class period began on June 5, 2009.

8 For this time period, the amount in controversy exceeds \$5 million. From June 5, 2009,
 9 through July 5, 2012, 2,985 putative class members have been or were employed by GameStop
 10 for 41 or more pay periods. Ex. B, Smith Decl., ¶ 6. These 2,985 putative class members would
 11 therefore be eligible for the statutory maximum award of \$4,000. Cal. Labor Code § 226(e).
 12 Thus, the amount in controversy for these employees alone is \$11,940,000 (2,985 class members
 13 x \$4,000 maximum award = \$11,940,000).

14 This figure does not include the alleged penalties for the other employees in California
 15 who worked less than 41 pay periods between June 5, 2009 and July 5, 2012, or any of the other
 16 claims alleged in the Complaint, which would only increase the amount in controversy further.

17 Accordingly, the amount in controversy from just one cause of action in Plaintiff's
 18 complaint exceeds the \$5 million jurisdictional amount under CAFA. Plaintiff's additional
 19 claims—for unpaid wages, overtime, and unfair competition—further increase the total amount in
 20 controversy.

21 2. The Amount in Controversy Is Satisfied for Diversity Jurisdiction Purposes

22 Although Defendant denies Plaintiff's allegations and denies that he or the class that he
 23 purports to represent are entitled to the relief for which he has prayed, based on Plaintiff's
 24 allegations, theories, and prayer for relief, the amount he has placed in controversy exceeds the
 25 \$5 million threshold set forth under 28 U.S.C. § 1332(d), even without taking into account him
 26 claims for unpaid wages, meal and rest break premiums, waiting time penalties, or the entire four-
 27 year class period that Plaintiff alleges.

1 Because there is diversity between the parties and the amount in controversy threshold has
 2 been satisfied, this Court has original subject matter jurisdiction to hear this dispute.
 3

4 **III. VENUE**

5 This action was originally filed in the Superior Court for the County of San Diego and is
 6 therefore removable to this District. 28 U.S.C. § 1441(a).
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8 **IV. NOTICE**

9 Defendant will promptly serve this Notice of Removal on all parties and will promptly file
 10 a copy of this Notice of Removal with the clerk of the state court in which the action is pending,
 11 as required under 28 U.S.C. § 1446(d).
 12

13 A true and correct copy of Plaintiff's original Complaint is attached hereto as Exhibit A.
 14

15 A true and correct copy of the Declaration of Everett B. "Chuck" Smith in support of
 16 removal is attached hereto as Exhibit B.
 17

18 A true and correct copy of Defendant's Answer, filed in the state court, is attached hereto
 19 as Exhibit C.
 20

21 **V. CONCLUSION**

22 Based on the foregoing, Defendant respectfully requests that this action be removed to this
 23 Court. If any question arises as to the propriety of the removal of this action, Defendant requests
 24 the opportunity to present a brief and oral argument in support of its position that this case is
 25 removable.
 26

27 Dated: July 20, 2012

28 MORGAN, LEWIS & BOCKIUS LLP

29 By /s/ Carrie A. Gonell

30 Carrie A. Gonell
 31 Attorneys for Defendant
 32 GAMESTOP, INC.
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EXHIBITS TO NOTICE OF REMOVAL

	<u>PAGE</u>
EXHIBIT A	10
EXHIBIT B	47
EXHIBIT C	50